

No. 15248.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EMIL WENTZ and WILLIAM BERING JENSEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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To the Honorable Albert Lee Stephens, Honorable James Alger Fee, and Honorable Richard H. Chambers.

Rule 28, Rules of United States Court of Appeals, for the Ninth Circuit.

Title 18, United States Code Section 1343 is found in the Communications Act Amendments of 1952. Therefore, the provisions of the Communications Act, Amendments of 1952, and all pertinent provisions in the Amendments are applicable. The 1952 Amendments are found in Title 47, United States Code, Chapter 5. Section 152 of Title 47, United States Code, recites:

“(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire . . .”

Section 153 thereof defines "communication by wire":

"(a) Wire communication or communication by wire means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services incidental to such transmission."

"(f) Foreign communication or foreign transmission means communication or transmission from or to any place in the United States to or from a foreign country, . . ."

"(e) Interstate communication or interstate transmission means communication or transmission from any state, territory, or possession of the United States . . . to any other state, territory, or possession of the United States . . ."

18 United States Code Section 1343, Fraud by Wire, being a part of the 1952 Communications Act Amendments, must necessarily be construed in the light of other pertinent portions of the 1952 Communications Act Amendments. The indictment herein alleges a scheme to defraud. It is the last paragraph thereof which must be construed as written, in the light of Communications Act Amendments of 1952. It alleges, as follows:

"On or about November 22, 1955, defendants . . . for the purpose of executing the aforesaid scheme and artifice, caused to be transmitted by means of interstate and foreign wire a signal and sound from the city and county of Los Angeles, California, within the Central Division of the Southern District of California, to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico . . ."

The function of the court is to construe the indictment as written. See: *Caywood v. U. S.*, 232 F. 2d 220, at page 231.

Under the Communications Act, Amendments of 1952, and specifically the definition therein of "foreign communication" or "foreign transmission," the gravamen of the offense alleged would be a communication or transmission from Los Angeles, California, to Mexico City, Mexico. The very definition fits squarely with the case at bar, namely, from any place in the United States, to wit, Los Angeles, California, to a foreign country, to wit, the Republic of Mexico.

Government counsel argues, in paragraph two, page 14 of his brief, that the words "and foreign" are descriptive only, do not constitute a necessary part of the indictment, and could have been wholly omitted without doing violence to the statement of the offense. In the light of the definition given by Congress in the Communications Act, Amendments of 1952, it would appear proper to assert that the definition itself, when applied to the indictment, eliminates the notion of interstate communication or interstate transmission and, therefore, the term "interstate" could and should have been wholly omitted therefrom.

Whether or not the chain of transmission was broken was a question of fact and should have been submitted to the jury under proper instructions.

Appellant requested instructions which would have permitted the jury to determine this question. The court refused to give the requested instructions to the jury. Appellant made timely objection to the refusal to charge as requested, giving the grounds for the objections before

the jury retired. Rule 30 of the Rules of Criminal Procedure was complied with.

By enacting the Communications Act of 1934 and the 1952 Amendments thereto, Congress had prescribed the standards upon which the guilt or innocence of the appellants were to be determined. It was the duty of the court to provide the jury with instructions which would set out the standards to be applied in the present case. This the court refused to do. Defendants' proposed instruction number 2 was refused by the lower court. This refusal is the basis of subsection (g), Specifications of Error, on page 6 of Appellants' brief. The court below gave Government's proposed instruction number 10, as follows:

"A telegram is sent by means of interstate wire as those words are used in the statute and in the indictment. If sent by a wire which crosses the state lines, whatever may be its destination . . ."

This instruction given does not comply with the standards set out in the Communications Act, Amendments of 1952.

In *Screws v. U. S.* (1945), 325 U. S. 91, 89 L. Ed. 1495, a conviction was reversed for failure to define the crime charged by reciting the essential ingredients thereof, even though counsel did not except to the trial court's charge to the jury. The court stated:

"Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which congress has prescribed."

In *Morris v. U. S.* (9 Cir.), 156 F. 2d 525, 169 A. L. R. 305, which was an appeal from a conviction after trial by jury, the court stated:

“It is our opinion that the trial court committed fatal error in failing to instruct the jury on the statutes and regulations defining and governing the offenses charged against the appellant . . . the court did not define the offense of which the appellant was charged and was being tried and the jury was given no opportunity of applying the facts to the law”

Appellants' position that the communication was a foreign one is best illustrated by reference to the Supreme Court Opinion in the case of *Texas & New Orleans Railroad Co. v. Sabine Tram Company*, 227 U. S. 111, at page 126, wherein the court states:

“The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demands of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle and means will be afforded of evading the national control of foreign commerce from points in the interior of a state. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the devise of separate bills of lading the commerce will be given local character, though it be essentially foreign.”

“Courts of the United States are of limited jurisdiction, possessing only such powers as are either expressly or by necessary implication conferred upon them. There is no presumption in favor of their jurisdiction.”

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371, 84 L. Ed. 329.

Since the telegram, which is the only means by which the court below acquired jurisdiction to hear and determine the questions presented by the indictment, on its face recites that it originated at Los Angeles and was transmitted to Mexico City, the definition in Title 47, United States Code Section 153, subsection (f) applies. The plain language thereof requires the conclusion that the wire did not bring the charge within the purview of 18 United States Code Section 1343.

Respectfully submitted,

ANGUS D. McEACHEN,

Attorney for Appellants.

Certificate of Counsel.

ANGUS D. McEACHEN, being first duly sworn, deposes and says, that:

I do hereby certify that in my judgment the herein Petition for Rehearing is well founded and that it is not interposed for delay.

ANGUS D. McEACHEN.